W-I Forest Products Company, a Limited Partnership *and* Lumber and Sawmill Workers Local 2841. Case 19–CA–20174

August 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 21, 1990, Administrative Law Judge James M. Kennedy issued the attached decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. The Respondent, W-I Forest Products Company, a Limited Partnership, filed a brief in support of the administrative law judge's decision and a motion to dismiss the complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and motion, and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order.

I. INTRODUCTION

The complaint in this case alleged that the Respondent's implementation of a smoking ban at its lumber mill in Peshastin, Washington, violated Section 8(a)(5) and (1) of the Act because it was done without the consent of the Lumber and Sawmill Workers Local 2841 (the Union). The complaint alleged that such consent was necessary because the smoking ban was among those issues governed by a ''Closure of Issues'' clause in a strike-settlement agreement executed by the Respondent and the Union. Thus, the General Counsel predicated the violation of Section 8(a)(5) on his contention that the Respondent had violated the closure of issues clause by its action.

The administrative law judge dismissed the complaint on three independent grounds. He concluded (1) that a smoking ban is not a mandatory subject of bargaining insofar as a union seeks to eliminate or restrict the ban; (2) that even assuming such a ban is a mandatory subject generally, the Respondent was not obligated to bargain because the changes in smoking restrictions reflected in the ban at issue here did not represent a material and substantial change from existing restrictions; and (3) that even if a bargaining obligation existed, the Union had waived its bargaining rights. In finding waiver, the judge rejected the General Counsel's argument that the closure of issues clause in the strike-settlement agreement applied to the ban. He found that the strike-settlement agreement applied only to matters which the parties had contemplated including in their collective-bargaining agreement, and he concluded that the parties had historically dealt with plant work rules, such as the smoking ban, outside the framework of the collective-bargaining agreement. Therefore, assuming arguendo the ban was a mandatory subject, the judge regarded it as a noncontractual change on which the Respondent need only afford the Union notice and an opportunity to bargain. The judge concluded that the Union had received timely notice and had waived its right to bargain by its failure to request bargaining. The judge also found waiver on the basis of the Union's abandonment of a contractual grievance it had filed on the subject.

We reverse the judge's findings that smoking bans are not mandatory subjects and that this ban did not represent a substantial and material change, but we agree with the judge that the ban was not covered by the closure of issues clause and that the Union waived its right to bargain over it by its inaction in the face of timely advance notice by the Respondent. Accordingly, we adopt his dismissal of the complaint.[1]

II. FACTUAL FINDINGS

As more fully outlined in the administrative law judge's decision, the issues in this case arose out of the facts that follow. In January 1987, the Respondent sought to implement a total ban on smoking on its property at Peshastin, Washington, and apparently at other mills as well. Prior to this time, smoking had been permitted during break periods in designated areas of the mill. That smoking rule was embodied in plant rule 3. The Respondent notified the Union by letter dated January 16, 1987, of its intention to implement the ban effective July 1, 1987, and its willingness to negotiate over the change. The Union responded to this letter by indicating that it would consider the unilateral implementation of this ban a violation of the collective-bargaining agreement in effect between the parties and a violation of the Act. On February 20, 1987, the Respondent answered the Union's letter by indicating that, if requested, it was willing to bargain

[1] Subsequent to the administrative law judge's decision, the Respondent filed a motion to dismiss the complaint as moot, presenting the threshold question of whether we need to reach the merits. In support of its motion, the Respondent offers the facts that the Peshastin mill was closed on April 22, 1990, pursuant to an agreement between the Respondent and the Union on April 18, 1990, and that the production equipment and buildings were sold at a public auction on May 3, 1990. The Respondent argues that the present case should therefore be dismissed as moot because the Peshastin mill has been permanently closed and therefore any alleged unfair labor practice could not be continued and any resulting order could not be enforced.

It is a well-established principle that ''mere discontinuance in business does not render moot issues of unfair labor practices alleged against a respondent. 'Irrespective of the ability of the respondent to comply with the order, a decree of enforcement is a vindication of the public policy of the statute.''' *Armitage Sand & Gravel*, 203 NLRB 162, 166 (1973). Where as here, the employer closes only one of several facilities represented by a union, there is no assurance that the alleged unlawful conduct could not be repeated. *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970). For these reasons, the motion to dismiss the complaint as moot is denied.

over the ban and requesting clarification of which contractual provisions would be violated by the ban. The Union did not reply to this offer and request.

Because the contracts in all the mills were to be reopened for negotiations in 1988, the Respondent elected to delay the implementation of the smoking ban for union-represented employees and to announce the new policy simultaneously with the contract proposals. The ban went into effect as originally scheduled however, for managerial and nonunion employees. Negotiations for the new contracts at all the mills began in 1988 and took place at two levels, one for the ''big table'' issues (uniform issues to be implemented company-wide at all mills) and the other for ''local'' issues (issues specific to each individual mill).

The Peshastin contract was set to expire on August 3, 1988, and one local bargaining meeting was held at which, among other matters, the smoking ban was announced and discussed. The Union suggested alternatives to the total ban, but no resolution was reached and the Union never made any written proposals. Subsequent to this meeting, strikes at some facilities occurred including a strike at the Peshastin mill, and no further local meetings took place for Peshastin.

On September 9, 1988, a strike-settlement agreement (Memorandum of Agreement) was signed ''Extending and Renewing Existing Agreements.'' Included in this agreement was a ''Closure of Issues'' clause which was understood by both the Respondent and the Union as designed to close any unresolved local bargaining issues for the term of the new agreement.

Following this agreement, on October 18, 1988, the Respondent posted announcements at locations throughout the mill of the new smoking policy to become effective on January 1, 1989. The notice was seen by the affected employees and there is evidence that the Union likewise was made aware of the announcement. The ban thereafter was incorporated into the plant rules and safety guides, infractions of which were grounds for disciplinary action including suspension and discharge.

On December 20, 1988, 2 months after the ban was announced, the Union filed a grievance through the three-step grievance procedure outlined in the collective-bargaining agreement. Under the terms of the agreement, this procedure does not lead to arbitration. The Respondent's plant manager denied the grievance, indicated that the ban was not a grievable issue, and designated violations of the rule as ''gross misconduct'' (i.e., behavior that, under the terms of the contract, could lead to discharge without notice). The ban took effect on January 1, 1989, as announced.

III. ANALYSIS

A. *The Plantwide Smoking Ban was a Mandatory Subject*

In concluding that the smoking ban was not a mandatory subject of bargaining, the judge noted at the outset, by reference to the reasoning of Justice Stewart's concurrence in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 220–223 (1964), that not every management practice that affects employees is necessarily a mandatory subject of bargaining and that some are strictly matters of entrepreneurial concern as to which an employer has no duty to bargain. In particular the judge analogized a smoking ban to the rules on journalistic ethics at issue in *Capital Times*, 223 NLRB 651 (1976), and *Peerless Publications*, 283 NLRB 334 (1987), on remand from 636 F.2d 550 (D.C. Cir. 1980). The Board had found such rules to be strictly entrepreneurial concerns because they had little impact on employees' jobs and were aimed solely at protecting a core purpose—credibility and integrity—of the newspapers that promulgated them.

Applying the logic of the journalistic ethics cases, the judge held that a total plantwide ban on smoking is not a mandatory subject because smoking during the workday has only ''an indirect impingement on job security,'' and because a rule banning smoking is consistent with ''the nation's public policy on smoking,'' which disfavors smoking on grounds of health. In particular, the judge relied on that national policy to conclude that a total ban on workplace smoking would not be a mandatory subject of bargaining if the union seeking bargaining sought to resist it entirely or to restrict its coverage, but that it *would* be a mandatory subject if a union sought to obtain or extend such a ban.

The judge acknowledged the existence of Board precedents that treated restrictions on smoking as mandatory subjects on which a refusal to bargain would violate Section 8(a)(5). *Albert's, Inc*., 213 NLRB 686, 692–693 (1974); *Chemtronics, Inc*., 236 NLRB 178, 190 (1978). He discounted them, however, by noting that the employers in those cases had also been found to have acted out of union animus, in violation of Section 8(a)(3), and that there was no extensive analysis of the 8(a)(5) violations.

The analogy the judge attempts to draw between the ethics codes in *Capital Times* and *Peerless Publications*, and the smoking ban at issue here inaccurately assumes that protecting employee health and carrying out recommendations of various reports by the Surgeon General are core entrepreneurial purposes of a lumber mill. These may be laudable objectives for any employer, but they do not go to the heart of the Respondent's business in the way that, for example, a

rule prohibiting a reporter from taking gifts from the source for one of her stories relates to the core entrepreneurial concern of a newspaper. Under the judge's logic, unions would not be free to bargain over the removal of vending machines from employee lunchrooms or breakrooms if the machines sold foods that were high in fat or sodium or were otherwise condemned as unhealthy by the Surgeon General. Safety rules would be similarly removed from the bargaining table if the union were seeking freedoms from restrictions that the employer could characterize as a means of promoting employee safety.[2]

We also disagree with the judge's reasoning that the smoking ban falls outside the ambit of ''terms and conditions of employment'' defined by Section 8(d) because it has only an ''indirect impingement on job security.'' The same could be said of the prices of food at an in-plant cafeteria. Yet the Supreme Court has held that ''the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain.'' *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). The Court said that the question is whether the subject matter is ''germane to the working environment.'' In our view, a rule that forbids smoking is ''germane to the working environment.'' Although smoking is not as critical to life-functioning as food in a cafeteria, and indeed may be deleterious to health, it is nonetheless a part of the working environment in which many smokers function. In addition, we note that in the instant case, a breach of the rule would constitute grounds for disciplinary action, including discharge and suspension. See *Johnson-Bateman Co.*, 295 NLRB 180, 183 fn. 18 (1989).

In sum, we find, as the Board implicitly did in *Alberts, Inc.*, supra, and *Chemtronics, Inc.*, supra, that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining, regardless whether the bargaining representative seeks to obtain such a ban or to limit or eliminate it. In our view, the Board's failure in those cases to engage in an extended analysis of the basis for finding smoking bans to be mandatory subjects of bargaining had little or nothing to do with the fact that, because they were imposed for unlawful retaliatory reasons, they violated Section 8(a)(3) as well as Section 8(a)(5). Rather, we think the more likely explanation is that the parties and the Board thought it self-evident that restrictions on employee smoking in the workplace are ''working conditions'' within the meaning of Section 8(d).

[2] We emphasize that we are concerned here with activities that are not prohibited by any law. Nothing in this decision is meant to suggest that the bargaining obligation defined in Secs. 8(a)(5) and 8(d) of the Act would require employers to consider proposals under which violations of law would be immunized in the workplace.

B. *The Total Ban Represented a Substantial and Material Change from Past Practice*

Having found that workplace smoking bans are properly classified as mandatory subjects of bargaining, we next consider whether the changes in the Respondent's smoking restrictions were sufficiently different from existing rules as to have a significant, substantial, and material impact on the employees' terms and conditions of employment. The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact. *Rust Craft Broadcasting*, 225 NLRB 327 (1976). Accord: *St. John's Hospital*, 281 NLRB 1163, 1168 (1986); *United Technologies Corp.*, 278 NLRB 306, 308 (1986); *Peerless Food Products*, 236 NLRB 161 (1978).

We do not agree with the judge that the change here lacked sufficient impact to make it subject to the bargaining obligation. The difference between being allowed to smoke only during breaks in designated areas (including breakrooms)—the pre-1989 rule—and not being allowed to smoke on the employer's property at any time clearly was a substantial and material change for those who smoked. As the judge recognized, although employees were free to go off the property during their breaks to smoke, this was not a simple matter. It meant walking from between 600 to 1500 feet from work stations out to an area next to a railroad siding beyond the Respondent's property line. Given the large accumulations of snow in the winter, this entailed, as the judge acknowledged, ''quite a bit of discomfort.'' Failure to obey the rules, the judge found, subjected employees to disciplinary penalties including suspension or discharge. The judge found that after the rule was put into effect, several employees were given disciplinary warnings. In our view, the total ban amounted to a more substantial change than was proven in *St. John's Hospital*, supra, where the Board found that a prohibition on smoking during a 15-minute reporting period between shifts was not a bargainable change because that 15-minute period was the only time affected and such a prohibition had been enforced at times in the past. 281 NLRB at 1168.

C. *The Change was not Covered by the ''Closure of Issues'' Clause*

Having found that the smoking ban at issue here was of such a nature as to make it subject to the bargaining obligation imposed by Sections 8(a)(5) and 8(d) of the Act, we next consider the General Counsel's contention that the ban was subject to the second paragraph of the ''Closure of Issues'' clause, set out in section IX of the September 9, 1988 strike-settlement agreement. The consequence of such coverage, the General Counsel argues, is that the ban would be included among those issues that the parties had agreed

to leave unresolved. Therefore, it is argued, the status quo could not be changed as to this matter during the agreed-upon renewal term of the collective-bargaining agreement. Having made such an agreement, the Respondent would violate Section 8(a)(5) by imposing the ban, regardless whether it offered the Union an opportunity to bargain about it. For the following reasons, we reject the General Counsel's exceptions on this point and affirm the judge's finding that the smoking ban was not subject to the ''Closure of Issues'' clause.

The strike-settlement agreement, which applied to all the Respondent's unionized plants, including the Peshastin facility, began with a preamble stating that the parties ''agree to the following amendments and revisions of each individual W-I Forest Products Company, L.P., collective bargaining agreement in full settlement of all subjects of collective bargaining.'' There followed various articles identified by roman numerals, setting forth changes in contract language. Section VIII provided as to local issues on which the parties had agreed and ''signed off'' that the language reflecting those changes would be ''incorporated into [the collective bargaining] agreements.'' The closure of issues clause (sec. IX) read, in its entirety, as follows:

> IX. CLOSURE OF ISSUES
>
> A. All issues upon which authority to negotiate was delegated by local Unions and district councils to the IWA and WCIW or their designated representatives, not covered herein, are withdrawn and closed for the term of the bargaining agreements as modified.
>
> B. Other issues opened either by local Unions, district councils or the Company not included in this settlement are withdrawn for the term of the bargaining agreements if unresolved because not signed or initialled as of the time this Settlement Agreement is signed and ratified.

The General Counsel argues that the subject of the smoking ban was an issue opened by the local unions, that it was left unresolved as of the time the strike-settlement agreement was signed, and that by virtue of the parties' agreement that such issues would be regarded as ''withdrawn for the term of the bargaining agreements.'' Accordingly, it is argued, the Respondent was obligated to leave existing smoking restrictions unmodified and could not even require the Union to bargain over any changes during that term. The Respondent does not dispute the General Counsel's theory of the operative effect of that clause. It simply disputes that the smoking ban is covered by it.

We agree with the judge that section IX,B, read together with the preamble to the strike-settlement agreement, establishes that the issues which the parties agreed to regard as ''closed'' were solely those issues that were negotiated within the framework of bargaining for a collective-bargaining agreement—issues on which language would have been added to or modified in the contract had agreement been reached.

The smoking ban was essentially a modification of an existing plant rule that restricted smoking to certain areas, and it is undisputed that the plant rules had never been part of the collective-bargaining agreement. Although two union representatives testified that the smoking ban had been discussed at the August 25 bargaining session and that the union representatives had expressed some views on it there, their testimony does not contradict the testimony of the Respondent's witnesses that the Union did not expressly propose at that meeting changing the parties' traditional framework for dealing with plant rules. Thus, while the Union presented written proposals on various issues discussed at that meeting, it never put anything into writing on the subject of smoking.[3]

In short, the smoking ban was not one of the subjects that the parties had agreed in section IX,B of the strike settlement agreement would be ''withdrawn for the term of the bargaining agreements if unresolved . . . .'' The Respondent was thus free to impose it during the term of the contract, so long as it first gave the Union notice and a reasonable opportunity to bargain.[4]

D. *The Union Waived its Rights by Failing to Request Bargaining After Notice that the Respondent Planned to Implement the Ban*

When an employer announces plans for a change in noncontractual working conditions, a union having sufficient notice of the contemplated change will ordinarily be deemed to have waived its bargaining rights if it fails to request bargaining prior to implementation. Further it is incumbent on the union to act with due diligence in requesting bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985), and cases there cited. Although a union may waive this right, such a waiver must be ''clear and unmistakable.'' *Kansas*

[3] We agree with the General Counsel's contention that the Respondent could not lawfully insist on keeping plant rules out of the collective-bargaining agreement if the Union wished to include them. We do not agree, however, that the question of whether there should be *contract* language on the subject of smoking restrictions was sufficiently crystallized prior to the execution of the strike-settlement agreement to permit a finding that the Respondent was insisting to impasse on keeping plant smoking rules out of the collective-bargaining agreement. In any event, that was not the theory of the complaint.

[4] The General Counsel has also argued in his exceptions that smoking restrictions should have been held in status quo during the term of the renewed bargaining agreement because art. 24 of that agreement (a waiver of bargaining, or ''zipper'' clause) required this. We decline to consider this contention because art. 24 was neither alleged nor litigated as material to the issues here. Hence, as the Respondent correctly observes, it had no notice or opportunity to offer any evidence concerning the significance of that provision. *Castaways Hotel*, 284 NLRB 612, 613–614 (1987), and cases there cited. Compare *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028–1029 (7th Cir. 1990) (no due process violation where respondent had itself relied on a particular contract clause and claimed surprise when the Board construed it as supporting the case against the respondent).

Education Assn., supra at 639, citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). We will not, however, find such a waiver, and hence will find that the unilateral change violated Section 8(a)(5), when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain. *Michigan Ladder Co*., 286 NLRB 21 (1987); *Owens-Corning Fiberglas*, 282 NLRB 609 fn. 1 (1987); *Kay Fries, Inc*., 265 NLRB 1077 (1982).

The judge found that the Union was on notice of the Respondent's plan to implement the ban at least as early as August 25, 1988, when the plan was briefly discussed at a contract negotiating session. The judge found that the Union waived its bargaining rights based on two grounds. The Union waived its rights when it made only a ''desultory effort'' to request bargaining after the Respondent provided it with notice and opportunity to bargain. Secondly, the judge reasoned that the Union might have believed a bargaining request would be futile but that it waived its bargaining rights because its failure to follow through on a contractual grievance it filed over the ban amounted to a failure to test the Respondent's willingness to bargain on the subject. The General Counsel excepts, contending that the Respondent had made it clear to the Union that it would not bargain over the matter. We agree with the judge's conclusion that the Union waived its bargaining rights. We base this conclusion, however, on grounds somewhat different from those on which the judge relied.

As we have already found, in agreement with the judge, rules on smoking had never been included in the collective-bargaining agreement, so the Union might have deemed it futile to pursue contractual grievances on the subject.[5] It was not, however, clearly futile for the Union to request bargaining. As noted in section II, above, the Respondent had first proposed extending its ban from the unorganized sectors of its work force to those represented by the Union in 1987, and on February 20 of that year, it had sent the Union a letter, signed by Hugh Bannister, the Respondent's labor relations spokesman, expressly declaring the Respondent's willingness to bargain on the subject. The Union never responded, and the original planned implementation date for the union-represented employees, July 1, 1987, passed without action because the Respondent decided to delay implementation apparently because of the controversial nature of the change.

When the Respondent later announced the January 1989 date for implementing the ban by posting notices on October 18, 1988, the Union had no basis for believing that the Respondent had withdrawn its earlier invitation to bargain. Thus, although the Respondent consistently maintained that the ban was not part of the negotiations over subjects to be addressed in the collective-bargaining agreement (the ''local issue'' dispute), it never stated that it would refuse to bargain over the subject at all. Furthermore while the Union received notice of the Respondent's intent to implement a smoking ban 2-1/2 months prior to the implementation date and although it filed a grievance over the matter, it never requested bargaining over the ban.

In his exceptions, the General Counsel cites remarks made to Union Steward John Ellis by some of the Respondent's managers as indicating the futility of requesting bargaining. Those remarks, however, address mainly the origin of the policy (''came down from the higher ups'') and the fact that these managers were not responsible for it and had no choice but to obey it. As noted previously, the rule was originally imposed on management as well as other segments of the unrepresented work force. The supervisor who spoke in the strongest terms about the futility of protest was Night Shift Foreman Jerry Pulse, but he was responding to Ellis' statement that he intended to file a grievance. Had the Respondent not offered in writing to bargain about this ban when it first announced it to the Union, perhaps the various remarks to Ellis would suffice to establish the futility of requesting bargaining. We simply find them insufficient, however, to overcome the Respondent's earlier express invitation to bargain.

Finally, we note that the Union's filing of a grievance over the smoking ban did not constitute a request for bargaining. *Haddon Craftsmen*, 297 NLRB 462 (1989) (filing, and then withdrawing, grievance not a request for bargaining). See also *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979) (protesting a change and filing an unfair labor practice charge does not constitute a request for bargaining). In any event, the theory of the Union's grievance was that the smoking ban violated a written agreement between the Respondent and the Union. The Respondent's disagreement with the Union's contention that it was precluded by terms of the collective-bargaining agreement from implementing the ban is not at all inconsistent with its understanding that it was obligated to give the Union notice and an opportunity to bargain over it prior to any implementation. For the reasons stated, we find that the Union had such notice and opportunity and failed to act on it. We accordingly conclude that the Union waived its bargaining rights.

[5] Because we find, as explained below, that the Union waived its bargaining rights by failure to request bargaining after it was on notice of the planned implementation, we find it unnecessary to pass on the judge's conclusion that the Union waived its rights by its failure to exhaust the grievance procedure set forth in arts. V and VI of the collective-bargaining agreement. Arguably, art. VI simply means that if an unsettled dispute is not submitted to Federal Mediation and Conciliation Service, the parties will have waived their respective rights to strike or lockout.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint in its entirety.

Max D. Hochanadel, Esq., for the General Counsel.
Louis B. Livingston and *Randy Steadman (Miller, Nash, Wiener, Hager, and Carlsen)*, of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Wenatchee, Washington, on October 17, 1989, upon a complaint issued by the Regional Director for Region 19 of the National Labor Relations Board on July 28, 1989. The complaint is based upon a charge filed by Lumber and Sawmill Workers Local 284l (the Union) on February 3, 1989. It alleges that W-I Forest Products Company, a Limited Partnership (Respondent or W-I) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.

Issues

The issue in this case is whether Respondent was privileged on January 1, 1989, to implement a no-smoking ban at its Peshastin, Washington mill. The General Counsel asserts that the rule was implemented in violation of a ''closure of issues'' clause found in a recently signed strike settlement agreement. Respondent asserts the closures of issues clause has no application to plant rules, but was directed instead at issues intended for insertion in the successor collective-bargaining agreement; it also argues the Union in several different ways waived its right to bargain over the issue.

I. JURISDICTION

Respondent admits it is a Washington limited partnership with an office and place of business in Lake Oswego, Oregon, doing business at various locations in Idaho, Montana, and Washington, including Peshastin where it is engaged in lumber production. It further admits that it meets both the Board's direct inflow and direct outflow interstate commerce standards and that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

As noted, Respondent operates a lumber mill at Peshastin, Washington. Its Peshastin production and maintenance employees are represented by the Union.[1] Respondent's operations, however, are not limited to the mill at Peshastin. It also operates similar mills in Coeur D'Alene and Colburn, Idaho, and Thompson Falls, Montana. Until late 1988, it operated a mill in Cashmere, Washington, quite close to Peshastin. All these mills (including Cashmere until its closing) are or were unionized operations. The two Idaho mills are represented by a local of the International Woodworkers of America, AFL–CIO, and the other three are represented by locals of the Lumber and Sawmill Workers, affiliated with the Lumber Production & Industrial Workers, through its Western Council.

Respondent shares certain managerial personnel with another lumber production firm, DAW Forest Products Company. Like Respondent, DAW operates mills in Montana, Idaho, and Oregon. As a result of their common interests, both unions and both employers have agreed to bargain in common fashion, although each of the facilities is covered by a separate collective-bargaining contract with the appropriate local union. These contracts do not have common expiration dates, although they usually expire during the same year.

In 1988 all these contracts were opened for renegotiation. The Peshastin facility had the latest expiration date, August 31, 1988. As that date approached, because the contracts at the other facilities had already expired, bargaining between the employers and the unions groups was already ongoing, taking place at two levels: the so-called ''central'' or ''big'' table issues and the ''local'' table issues, limited to a given plant. All of these issues were destined to be embodied in the actual collective-bargaining agreement (or if they were table issues which had not survived bargaining, were to be excluded from the collective-bargaining contracts). There was, however, a third type of concern which may or may not have involved a bargaining obligation as defined by Section 8(d) of the Act, but which the parties normally did not consider part of the contractual process. Nonetheless, the parties agree that the topics covered are often mandatory bargaining subjects and they do negotiate resolutions of them. These are the plant and safety rules which may vary from plant to plant. They usually deal with safety or employee behavior matters. For example, at Peshastin Respondent has issued a document known as the ''Safe Practice Guide.'' It is a rather extensive booklet detailing the plant rules. It sets forth directives on such things as proper protective clothing, attendance, bringing or using intoxicants/drugs, horseplay, and the like. It also included, prior to January 1, 1989, plant rule 3, which proscribed smoking except in approved areas.

B. *The No-Smoking Rule at Peshastin*

As noted above, prior to January 1, 1989, smoking had been prohibited at the Peshastin plant except in designated areas. Testimony suggests that there were at least two such areas. The January 1, 1989 ban, however, was to eliminate them and to prohibit smoking by anyone anywhere on the site or in any company vehicle off the site. The ban had actually begun in 1987 when a directive was issued to all unrepresented employees, including supervision and higher management, which prohibited them from smoking anywhere

[1] The bargaining unit which the Union represents has been admitted and is described as follows:

All production and maintenance employees at Respondent's plant at Peshastin, Washington, exclusive of office and clerical help, retail salesmen, superintendents, or professional or supervisory employees and watchmen or plant guards, as defined by the Labor Management Relations Act of 1947, as amended.

in the plant. According to their chief negotiator, Hugh Bannister, the two employers actually had intended to impose the ban in 1987, but ultimately decided that since they would be bargaining with the Unions at the various plants in 1988, they would wait to put the smoking ban to the Unions simultaneously with the proposals for new collective-bargaining contracts.

Bannister testified that the reason Respondent and DAW decided to impose this ban at their plants was to avoid certain state workmen's compensation decisions which had held employers liable for tobacco-induced illness in circumstances where employers had allowed smoking on the premises. In addition, according to Bannister, W-I and DAW were troubled because they did not wish to be in a position where they could be accused of promoting the idea of smoking or continuing to promote smoking. Moreover, he says, it was the companies' understanding that smoking was creating serious problems with emphysema and lung cancer which had a direct affect on the cost of health and welfare, and, although those costs would be indirect to the companies due to their membership in various health trusts, it was nonetheless a consideration.[2]

In any event, beginning in January 1987, Bannister began an effort to implement the smoking ban at Peshastin and probably other locations as well. On January 16, 1987, he wrote the Charging Party's agent, Hank Pieti,[3] a letter proposing to implement a no-smoking policy for a ''safe and healthy work place,'' noting that it had already been implemented with respect to nonbargaining unit employees. He offered to meet and negotiate with Pieti or his representative on the matter. He stated in the absence of the Union's willingness to negotiate on that topic, the policy would go into effect on July 1, 1987.

In response to Bannister's letter, James S. Bledsoe, executive secretary of the Western Council, wrote Bannister asking Respondent to rescind its decision since all of the collective-bargaining agreements were closed until various months in 1988. He said the Union would view unilateral implementation of the policy as being a violation of the Act as well as the contract. On February 20, 1987, Bannister replied to Bledsoe with two letters, one for W-I and one for DAW, in which both companies declined to rescind their proposed no-smoking policies, but did offer to negotiate about them before implementation on July 1, 1987. He disagreed with Bledsoe's assertion that implementation of the policies would violate either the collective-bargaining contracts or the Act. Nonetheless, he said, both companies stood willing to bargain in good faith about the bans if bargaining was requested. To support his argument that they did not violate the contracts, he observed that they were silent about smoking. He asked Bledsoe to advise him what contract provisions led him to believe that the contract would be breached if the ban was instituted. Bledsoe did not respond further. Nonetheless, both companies decided to await the 1988 negotiations to pursue the matter, apparently making the judgment that earlier implementation would unnecessarily exacerbate the situation before bargaining even began.

On various dates in 1988 the Unions opened the contracts at other locations. Bannister responded for both companies. He proposed some contract modifications including a ''substance abuse program'' to become effective on January 1, 1989. At the end of each letter he included language identical or similar to the following:

> Subject not proposed for negotiations that the Company hereby offers the Union an opportunity to discuss, the Company intends to modify the ''Safe Practices Guide,'' which includes the ''Company Plant Rules.'' [Sic.]
>
> Said ''Safe Practices Guide'' and ''Company Plant Rules'' shall be modified as follows: ''Smoking is prohibited on all Company property and in all Company vehicles.'' Effective January 1, 1989.

As noted, Peshastin was the last contract to be reopened. Bannister explained that because Peshastin came so late in the year, and the other facilities were already undergoing strikes, he did not write the same letter to the Charging Party. Indeed, he was unable to attend the opening (and only) round of local negotiations for Peshastin. He delegated that duty instead to Phil Bradetich. Bradetich was the corporate director of safety and performed various duties, including employee relations/industrial relations. Bradetich had been in attendance at the central table in Portland and some of the local table negotiations elsewhere. He was quite familiar with Respondent's point of view.

Prior to delegating Peshastin to Bradetich, Bannister had not prepared a letter such as that quoted above, nor had he prepared Respondent's counterproposals with respect to the Peshastin contract. Accordingly, Bradetich, in conjunction with plant manager Steve Rossing, prepared a draft of the document which has been received in evidence as Joint Exhibit 13. A copy was sent to Bannister for his review. Upon looking it over, he noticed that the draft omitted the substance abuse program and no-smoking policy issues which had been included in the letters sent to the other locations. He telephoned the office secretary at the Peshastin plant and asked her to include the phrases ''negotiate a 'substance abuse program''' and ''no-smoking policy'' at the bottom of that exhibit. The final version of that exhibit contains those phrases.

On August 25, 1988 representatives of Respondent and the Charging Party met in Wenatchee to discuss the Peshastin local issues. Representing the Union were Pieti of the Western Council, Local 2841 President Barry Moats, and three

---

[2] That ''understanding'' is more than simple speculation. For almost 30 years the United States Surgeon General has required warnings of possible lung disease on cigarette packages. The issue reached a new crescendo on February 20, 1990, when Louis Sullivan, Secretary of the Department of Health and Human Services, issued a report to Congress finding that smoking-related diseases were costing the United States public more than $52 billion annually. That figure, according to the report, amounts to an annual expenditure of $221 for every man, woman, and child in the nation.

On the same day, a major union, the Service Employees International Union, AFL–CIO, issued a report saying that 78 percent of the strikes which occurred throughout the nation in 1989 were caused by disputes over health care coverage. It said this broke a 40-year period where strikes were not so motivated. These strikes, said the SEIU, cost the economy over $1.1 billion in lost wages. (San Francisco Examiner, Feb. 20, 1990, publishing UPI wire report.)

While the SEIU report (at least the news story) does not refer to smoking related diseases as a cost of driving up health insurance costs, it is hardly a wild guess to conclude that elimination of the $52 billion referred to by Secretary Sullivan would greatly reduce health insurance premiums and significantly reduce the number of strikes over health issues.

[3] Pieti is the area representative for the Western Council of Industrial Workers, the Charging Party's intermediate parent. Pieti represented Local 2841 in its 1988 negotiations with Respondent.

committeemen. Company representatives were Bradetich, Plant Manager Rossing, and a man identified as Dean Weaver.

Although Pieti and Bradetich's testimony is somewhat different, it appears that during the course of the meeting the no-smoking policy was raised and discussed.[4] The parties were in agreement that the substance abuse policy was appropriate for the central table as it was already being discussed there. Pieti declined, however, to accept the no-smoking policy as Bradetich outlined it. He instead proposed that smokers be limited to certain locations away from the mill itself including an old lunchroom and the boilerroom. Nothing was resolved on that date with respect to no smoking and the parties went on to discuss the other proposals. Bradetich testified, without contradiction, that the no-smoking proposal was intended to be a modification of the plant rules which are not considered to be part of the collective-bargaining contract proper.

The August 25 meeting was the only meeting dealing directly with Peshastin falling within the category of a ''local issue'' meeting. According to Pieti, the strike ensued directly after that and the strike settlement was signed before the parties ever got back together. He says, ''We weren't allowed to settle local issues.''

C. *The Closure of Issues Clause*

On September 9, in order to settle the strikes at all locations for both companies, a memorandum of agreement was signed ''Extending and Renewing Existing Agreements.'' This memorandum consisted of 5-1/2 single-spaced typed pages dealing principally with ''big table'' issues. It covered the Peshastin mill, as well as the mills in Coeur D'Alene and Colburn, Idaho, Thompson Falls, Montana, and the mill in nearby Cashmere. The preamble to the memorandum states the parties ''agree to the following amendments and revisions of each individual W-I Forest Products Company, L.P., collective bargaining agreement in full settlement of all subjects of collective bargaining.'' Articles VIII and IX, quoted below in the footnote,[5] essentially say that matters which had not been agreed upon at either the central table or the local tables were considered withdrawn for the term of each collective-bargaining agreement unless they had been signed or initialed at the time the memorandum was signed and ratified.

Both Pieti and Bannister are in agreement that paragraph IX,A deals with the big table issues and IX,B deals with local issues. Bannister says they covered those proposals which were aimed at insertion in the collective-bargaining agreement. Pieti was not asked whether he understood that limitation on sec. IX,A, but agrees that sec. IX,B was designed to cut off unresolved local issues from being raised in the future.

D. *Managements Rights*

The new collective-bargaining contract, in addition to the matters set forth in the strike settlement agreement, also carried over the management's rights clause of the preceding contract. The clause is quite broad, reading as follows:

> *Article 2, Section 2.* The Company shall have all of the authority customarily and traditionally exercised by management except as that authority is limited by the express or specific language in the provisions of this Agreement. Nothing in the Agreement shall be construed to impair the right of the Company to conduct any or all aspects of its business in any and all particulars except as expressly and specifically modified within the terms and provisions of this Working Agreement. Among other things which are not affected by this Agreement is the exclusive right of the Employer to determine the products to be produced or manufactured, the location of its plant or operations, the methods, processes and means of production, marking, naming, manufacturing and sale or distribution of its products, the increase and decrease of its workforce as dictated by operational requirements, the schedule of hours of work, shifts, and overtime and the maintenance of an efficient and properly disciplined workforce as necessitated by the requirements of the operations and the conduct of sound business principles as determined by the Employer.

E. *Implementation of the No-Smoking Policy*

The no-smoking policy was actually implemented on January 1, 1989. It was not limited to the Peshastin operation, but was systemwide insofar as Respondent was concerned. It also appears to have been systemwide for the DAW locations. Bannister testified that smoking ban unfair labor practice charges were filed only at Peshastin, not anywhere else.

The actual announcement of the January 1 implementation occurred 2-1/2 months beforehand. On October 18, 1988, Respondent's sawmill superintendent Chip Baird posted a notice in five locations in the plant. Each of these locations was in a breakroom or area of high visibility. The language of the notice is set forth in the footnote below.[6] The notice received immediate and widespread attention and affected employees in both management and in the bargaining unit, including union trustee and Shop Steward John Ellis as well

[4] Pieti says he brought up the no-smoking proposal himself as they went through Respondent's proposals. Bradetich says he did not give a copy of Jt. Exh. 13 to the Union until after the meeting ended as he had planned to use the document only as his own guide. As the meeting ended, he caused sufficient copies of the document to be photocopied and these were distributed to the union team. This difference in recollection is insignificant.

[5] VIII. LOCAL ISSUES

Local issue language changes shall be incorporated into those agreements where local issues have been mutually agreed to, and signed off.

IX. CLOSURE OF ISSUES

A. All issues upon which authority to negotiate was delegated by local Unions and district councils to the IWA and WCIW or their designated representatives, not covered herein, are withdrawn and closed for the term of the bargaining agreements as modified.

B. Other issues opened either by local Unions, district councils or the Company not included in this settlement are withdrawn for the term of the bargaining agreements if unresolved because not signed or initialled as of the time this Settlement Agreement is signed and ratified.

[6] As of January 1, 1989, a no-smoking policy will be in effect. There will be no smoking in vehicles or equipment parked on company property.

The ''Safe Practices Guide'' and ''Company Plant Rules'' shall be modified appropriately to reflect this policy.

This notice is being issued at this time in hopes that perhaps in the next 3 months, those of you who do smoke, may find it easier to ''ease'' into a smokeless workday.

It is understandable that the ''no smoking'' rule will be difficult for many of you: And we thank you for your cooperation.

as Baird himself, and his superior, Plant Manager Rossing, all of whom are smokers.

The rule was rather quickly incorporated into three company documents. Respondent began typing the rule in the front page of the Safe Practice Guide which was distributed to new employees. It also appeared in reprinted plant rules and safety notices. Respondent's Exhibits 16 and 17. Both of the latter two documents are headed with a notice that a breach of any of those rules was ground for immediate disciplinary action, including suspension or discharge.

On December 20, 1988, at the behest of Ellis, the Union filed a grievance asserting that the no-smoking rule was being improperly implemented as it had been an unresolved local issue during the August 25 negotiations and had been ''closed'' by the strike settlement agreement. On December 23 Plant Manager Rossing denied the grievance saying that although the policy had been announced during local negotiations it was not a bargaining issue. He went on to say that a violation of the rule would be considered an act of ''gross misconduct.'' Thereafter the rule was put into effect and several employees were ''white-slipped,'' i.e., given warnings.

Article 8 of the new collective-bargaining contract provides that Respondent will issue warnings to misbehaving employees before exercising the right of discharge unless the behavior constitutes ''gross misconduct.'' Rossing's response to the grievance seems to be a message to smokers that they will be discharged without benefit of a warning. Despite his admonition, the white slips followed, though there is some tentative testimony that warnings have been since dropped in favor of discharge.

F. *The Effect of the Rule*

Although there is evidence that the rule is occasionally broken surreptitiously, it is clear that the rule is being enforced against all employees at the plant, bargaining unit, and management alike. Not only is Baird a smoker, but his superior, Rossing is, too. So are Ellis and numerous bargaining unit employees. The record contains testimony regarding the length to which employees must now go to satisfy their habit. It appears that upper management, including Rossing and Baird, as well as bargaining unit employees, now walk, depending where they are stationed within the plant, between 600 and 1500 feet to a grassy area near a railroad siding. It should be noted that Peshastin is located in the northeastern portion of the Cascade Mountains, an area which accumulates a large amount of snow during the winter. Leaving the premises for a cigarette entails, in that circumstance, quite a bit of discomfort. On the positive side, however, Baird, at least, concedes the rule has reduced his smoking by half.

IV. ANALYSIS AND CONCLUSIONS

A. *Introduction*

It should be noted at the outset that the complaint is limited to the implementation of the smoking ban. It does not in any way allege that the discipline which Respondent might choose to levy upon an employee for an infraction of the rule violates Section 8(d) or Section 8(a)(5). Since a breach of the rule at the very least gives rise to a warning, and may result in discharge, that omission is a puzzle. Clearly the appropriate discipline to be meted out is a mandatory subject of bargaining. *Capital Times Co.*, 223 NLRB 651 (1976); *Purolator Products Co.*, 289 NLRB 986 (1988). It may be that the Union failed to demand bargaining on that subject or there may be some other defect to such a claim. Whatever reason there may be, clearly the issue has not been noticed by the complaint or litigated and the Board may not address it.

As written, the complaint alleges that the implementation of the smoking ban at Peshastin breaches the good-faith bargaining obligation of Section 8(d) of the Act in that it assertedly is a unilateral change in working conditions. Section 8(d) defines the topics over which parties must bargain and codifies those mandatory subjects of bargaining which have been incorporated in the collective-bargaining contract for the term of that agreement. It also bars parties who unsuccessfully sought to obtain contract language covering a mandatory subject during negotiations from forcing the other party to again bargain over that subject during the contract term.[7] Generally speaking, therefore, a party which imposes a change in a mandatory subject during the course of the contract, breaches Section 8(d) and therefore Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Kal Kan Foods*, 288 NLRB 590 (1988); *Master Slack Corp.*, 230 NLRB 1054 (1977).

In order to determine, therefore, whether there has been a violation of Section 8(a)(5) of the Act one must first determine whether the subject matter in question is a mandatory subject of bargaining. If so, there is the issue of whether the change has actually had a significant impact on working conditions. There are a number of cases which hold that even though the subject might be a mandatory bargaining topic, the unilateral change had no real impact on any working condition and therefore no unlawful unilateral change had occurred. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Peerless Food Products*, 236 NLRB 161 (1978); *Weather Tec Corp.*, 238 NLRB 1536 (1978); *Clements Wire & Mfg. Co.*, 257 NLRB 1058, 1059 (1981); *United Technologies Corp.*, 278 NLRB 306, 308 (1986); *St. John's General Hospital*, 281 NLRB 1163, 1168 (1986).

Finally, assuming that it did have an impact on a working condition, there is still the question of waiver. Quite often noncontract matters, such as plant rules, have a life of their own and a union's waiver of the right to bargain over them can be inferred from circumstances. One common form of waiver is where the employer raises an issue, notifies the union of the problem and the manner in which it intends to deal with it, simultaneously offering to bargain over it. When the union declines to bargain despite a fair opportunity to do so, a waiver will commonly be found. *Shell Oil Co.*, 149 NLRB 305 (1964); *American Cyanamid Co.*, 185 NLRB 981, 987 (1970); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979); *Castle-Pierce Printing Co.*, 251 NLRB

[7] *Sec. 8(d).*

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract [emphasis added].

1293 (1980); *Dilene Answering Service*, 257 NLRB 284, 290 (1981) (holiday schedule issue).

A third, relatively common, waiver may be found through a broad managements-rights clause. Different language, however, may effect different results. *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 567–568 (1979); *BASF Wyandotte Corp.*, 278 NLRB 181, 182 (1986); *Saints Mary & Elizabeth Hospital*, 282 NLRB 73 (1986). Cf. *Emery Industries*, 268 NLRB 824 (1984) (management's-rights clause coupled with past acquiescence). Also *Murphy Diesel Co.*, 184 NLRB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971).

Here both parties have assumed that the no-smoking rule is a mandatory subject of bargaining as defined by Section 8(d) of the Act, an assumption which, in hindsight, seems dubious. Because of that assumption, however, Respondent strongly argues waiver. It recalls that beginning in 1987 it notified the Union of its intent to impose the ban. In 1988, at local bargaining throughout both the W-I and DAW systems, the smoking ban was raised, although at all locations other than Peshastin the ban was clearly aimed not at the collective-bargaining contract, but at a modification of the plant rules. I think it is fair to say, however, that the Charging Party at Peshastin, given the guidance it was receiving from Pieti, was not misled in any way about the noncontract nature of the Peshastin smoking ban. As with the other mills, it was not ever intended to be included as part of the collective-bargaining contract, but to be inserted in the plant rules in the same manner as at all the other sites.

B. *The Closure of Issues Clause*

I think it is reasonable to conclude that the closure of issues clause of the strike-settlement agreement, when the preamble and section VIII and IX,B are read together, does not apply to the ban. Section VIII states that local issue language changes are to be incorporated in those agreements where they have already been mutually agreed to prior to the strike settlement; and section IX,B states that other issues opened either by local unions district councils or the Company which are not included in the settlement are withdrawn for the term of the bargaining agreement if they have not been signed. To the extent there is any ambiguity in that language, it is resolved both by the preamble, which limits the memorandum to contact issues and by Bannister's unchallenged testimony that he, as a signer of the agreement (the only one to testify), intended the language to cover contract issues and nothing more. Indeed, insofar as plant rule matters are concerned there is no evidence that sign-offs or initialing was a a procedure used when changing or installing a rule.

Based upon that analysis, I reject the General Counsel's contention that the closure of issues clause controls the smoking ban. As a rule matter, the ban was exempt from the closure of issues clause and the parties understood, or should have understood, that. Accordingly, I shall not discuss the General Counsel's primary theory any further. Instead, I shall analyze the matter as if it were a noncontractual change in working conditions.

C. *Mandatory Subject of Bargaining*

Thus, the question which must be answered is whether an employer's total ban on smoking is a mandatory subject of bargaining. Although facially it must be conceded that it would appear to be, I am not convinced. Yet the issue must be decided before proceeding to the defenses of exceptions and/or waiver. If it is not a mandatory subject, then it is unnecessary to reach them.

For many years the Board and the Supreme Court have attempted to outline the scope of 8(d)'s reference to ''terms and conditions of employment.'' The phrases ''mandatory'' and ''non-mandatory'' subjects of bargaining can lead to strange territory depending on which party wants what. In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the employer bargained to a contract impasse over a so-called ''ballot clause'' requiring members to vote before striking over nonarbitrable disputes. The Court had no difficulty in concluding that the clause was unrelated to ''terms and conditions of employment'' and therefore the employer's insistence to impasse on the clause breached the good-faith mandate of Section 8(d) and Section 8(a)(5). In *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the union demanded that the employer bargain over retirees' health benefits. The Court found the employer's refusal to do so was not a breach of Section 8(d) because retirees were no longer employees and their well-being was not a vital concern to active employees.

In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the Court unanimously agreed that the contracting out of unit work fell within the mandatory scope of Section 8(d), but Justice Stewart, joined by Justices Harlan and Douglas, in a concurring opinion, noted that Section 8(d) is a statute which uses language of limitation and that Congress did not intend to place every decision an employer might make into the bargaining arena, even if the decision had some impact on job security. He said, ''Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control . . . . If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.'' 379 U.S. 203 at 223 (emphasis added). This language has found general acceptance and has recently been followed. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). To be sure, that case dealt with corporate direction rather than indirect impingment on employment security, but it clearly demonstrates the correctness of Justice Stewart's observation that Section 8(d) is one of limitation.

Likewise, the Board's decision in *Capital Times*, 223 NLRB 651 (1976), appears to recognize his analysis. There the newspaper unilaterally imposed a code of journalistic ethics upon its news gathering staff, including a directive that reporters cease accepting gratuities from news sources. The Board found the imposition of the code itself (as opposed to the discipline to be levied for its breach) to be a nonmandatory subject and beyond the reach of Section 8(a)(5). It said the prohibition against reporters' accepting gifts was a proper exercise of a management right. It was not necessary, said the Board, for an employee to accept a gift from a news source to enable him to do his job. See also *Newspaper Guild Local 10 (Pottstown Mercury) v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), a remand clearly referencing Justice Stewart's *Fibreboard* language, but tying the ethics

rule to the connected discipline, asking the Board to explain why the two should be treated separately. In its decision responding to the remand, the Board held that if the rule itself lay at the ''core'' of entrepreneurial control, and was thus not a mandatory bargaining subject, then neither was the discipline. *Peerless Publications (Pottstown Mercury)*, 283 NLRB 334 (1987). Curiously, however, it retreated from its previous recognition of Justice Stewart's finding that Section 8(d) is a statute delineating limits. It said that the concept of ''terms and conditions of employment'' is deliberately broad and Congress intended it to be so. Yet, while embracing the circuit courts concern that a core rule and the discipline to be associated with it are to be considered together (thus, generally denying to an employee disciplined for its breach the right to bargained-for representation), it did agree with Judge MacKinnon that there may be exceptional cases for which an excessive penalty renders a rule mandatorily bargainable. I find myself in sympathy with all points of view here, but believe the Board had it right in *Capital Times* when it allowed for the bargaining severability of the rule and its discipline. The rule announced in the remand seems awfully brittle and destined to have unjust results.

Of course, plant rules, in general, have been held to be mandatory bargaining topics. *Womac Industries*, 238 NLRB 43 (1978); *Electi-Flex Co.*, 238 NLRB 713, 731 (1978). Yet there are obviously areas of rule making (employee ethics being the above-cited example) which are not covered by Section 8(d). No one questions, for example, at least in the absence of Section 7 restraint or coercion, an employer's unilateral right to set rules insisting on basic employee attributes such as honesty, sobriety, civility, good health,[8] and competence. Of course there may be reasonable disputes over the application of these rules or whether a rule has been breached, but no one seriously argues that setting rules on those subjects is not within the employer's exclusive power. Congress, when passing Section 8(d), did not place those matters into the bargainable arena. Case law on these basic subjects, free of union animus complications, are nonexistent, no doubt due to universal recognition of that fact. If journalistic ethics also fall within that category, where then does a total ban on smoking fall? Is it within the area left to employers by Congress or is it in the bargainable arena?

I am persuaded that the mandatory nature of a smoking ban depends on which direction the parties wish to go. Do they wish to create a more healthful or less healthful working environment? Here, it seems to me that Respondent has taken steps to improve the health of its employees while the Union and the General Counsel seek only to maintain a less healthy environment. Usually a bargaining topic is mandatory or nonmandatory on its own terms no matter what direction a party wishes to go. *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952). Yet, when it comes to employee health, however, I conclude that the analysis does not obtain. It is clearly the nation's public policy, as set forth in various Surgeon Generals' reports, to try to control the nation's health costs by eliminating or reducing smoke-related diseases such as cancer, emphysema, and chronic bronchitis. These diseases have contributed greatly to the cost of health and have made workers less productive. The Federal Aviation Administration accepted that policy on February 25, 1990, when it banned smoking on domestic commercial flights. I find, therefore, that the General Counsel and the Union are on the wrong side of this issue here, at least insofar as their position is inconsistent with national health policy.

But even insofar as national labor policy is concerned, it is inappropriate for the General Counsel, as representing the Government's point of view here, to be asserting that a union has the right to allow workers to degrade their own health as well as that of fellow employees who may inhale secondhand smoke. It was the purpose of the Wagner Act to allow labor unions the right to seek to improve their working conditions in the belief that improved working conditions would better contribute to the well-being of our society. Under the Wagner Act and its amendments workers were impelled to negotiate better wages and more healthy working conditions. In large part, of course, that has happened. This Union, however, joined by the General Counsel, seems to wish to go the opposite direction. That is contrary to the policy of the Act.[9] Moreover, like honesty, sobriety, civility, good health, and competence, a smoking ban is insoluble from a bargaining standpoint. It is just not the sort of rule which is subject to the marketplace, amenable to give and take. And, to use the *Capital Times* phraseology, smoking is not necessary to enable an employee to do his or her job. It is better, I think, to recognize that total bans on smoking fall within Justice Stewart's area of indirect impingement on job security. I conclude that an employer's total ban on smoking is a nonmandatory subject of bargaining.[10] Therefore, Respondent was free to implement it without the Union's consent.

This result is to be distinguished from other situations such as a partial ban or a union's demand to totally ban smoking. It may appear anomalous to so conclude, but I do not think it is. As I observed in the beginning of this discussion, it is not unusual, in unilateral change jurisprudence, depending on which party wants what from the other, to find oneself in unfamiliar territory. Symmetry is not always possible, nor is it always desirable. In any event, it is clear from an analysis of the cases that the Board has never squarely been asked whether an employer's unilateral total ban on smoking is a mandatory subject of bargaining. Naturally enough, therefore, it has not answered that question. It is true

[8] The Congress and the various states have imposed their values relating to employee good health in enacting statutes protecting the handicapped. Yet, it is quite clear that those laws describe rights much different from those referred to in Sec. 8(d).

[9] Frankly, I find it difficult to believe that a labor organization would want to bargain over a total ban at all. Labor unions, like most groups, are made up of smokers and nonsmokers, some of whom are most militant in insisting upon their point of view. If that issue came to debate on the floor of a union meeting, I suspect it would be most divisive and might have unwanted internal political effects. It seems to me that most unions would not want to tackle the issue for that reason alone. Leaving it to the employer at least takes it out of the political environment and lets him take the heat (which this employer wants to do).

[10] I recognize that there are cases decided by the Federal Labor Relations Authority in the federal sector which have required federal employers to bargain over similar bans. I regard those cases as distinguishable for the statute under which they have been decided is significantly different from Sec. 8(d). *Department of Health and Human Services, Indian Health Service, Oklahoma City*, 31 FLRA No. 33 (1988), 132 LRRM 2492 (D.C. Cir. 1989); *Fort Leonard Wood*, 26 FLRA 593 (1987). That statute requires a federal employer to bargain unless the rule is within the Agency's authority to set ''technology, methods and means'' of performing work. [Federal Service Labor-Management Relations Act, Sec. 7116(a)(1) and (5).] Sec. 8(d) of the NLRA approaches the question of bargainable issues from a totally different direction and is simply not comparable.

that the Board has had smoking issues come up before, and has even found unlawful unilateral changes. See the cases cited by the General Counsel, *Albert's, Inc*., 213 NLRB 686 (1974), and *Chemtronics, Inc*., 236 NLRB 178 (1978). Yet those cases are facially distinguishable. Both were in the context of reprisals for union activity and neither analyzes whether smoking is a bargainable subject as defined by Section 8(d). It was simply assumed to be the case. Moreover, they fall within a group of cases where the analysis is affected by union animus. I do not suggest that union animus is a factor to be considered in unilateral change cases, but only observe that where it is present, less consideration is often given to the bargaining duty analysis because it is unnecessary to the outcome, particularly where clear mandatory subjects are included in the change.

Possible anomalies aside, I conclude that a union seeking a more healthy work environment acts consistently with the Wagner Act when it asks an employer to eliminate the hazards of tobacco smoke. It is acting for the good of the whole, not the personal needs of some. Therefore, I do not find it disharmonious to hold that a union's demand to eliminate, or partially eliminate, smoking is a mandatory topic which an employer must meet, while an employer need not meet with the union if it has eliminated or intends to eliminate the hazard altogether. Likewise, if an employer only intends to partially eliminate smoking, and the union wishes to bargain over that, either for the purpose of extending the ban or for arranging the manner of controlling smoking, it must do so, for partial bans under my analysis must be bargained. Indeed, if I had been asked, I would have found that an employer who imposes a total ban, after having allowed smoking, would be obligated to bargain over the effects of the change. This would allow bargaining for such things as an adequate transition period or even to ask an employer to pay for cease-smoking programs. That would still leave the ban itself within the employer's exclusive domain.

Even if one were to find a smoking ban unilaterally imposed by an employer to be a mandatory subject of bargaining, I would be forced to conclude, on this record, that there is really no significant impact on Respondent's employees' working conditions. First of all, bargaining unit employees had never been allowed to smoke while performing their regular work tasks. Smoking had been permitted only on breaks and in locations away from the production area. Thus there was already a near-total ban in place. On January 1, 1989, the ban was simply extended to eliminate the smoking havens. Employees still receive the same number of breaks and are privileged to go to the same breakrooms as before for the same length of time. Now, however, a nonsmoker may enter a breakroom where smoking had previously been permitted but without having to encounter secondhand smoke. The fact that smokers must now make a difficult trek in a short period of time to find a nonmill location to smoke is a matter of their own choice. They are the ones who have chosen to become addicted to tobacco and who have chosen to take the health risks associated with it. Theirs is a personal condition which they have imposed upon themselves; not a condition which the employer has set. Thus Respondent is simply telling its employees that if they choose to take this health risk, it is their own responsibility, but they must do it at a location where the Employer cannot be seen as having encouraged it in any way. The impact of this ban, although perhaps subjectively important to the smoker who has been denied the privilege, is, objectively speaking, not much. It has no significant impact on their working conditions, nor is smoking necessary to a successful break. Accordingly, I would dismiss this case on that ground as well. See *St. John's General Hospital*, 281 NLRB 1163, 1168 (1986) (smoking ban during shift change did not have significant impact).

Continuing to assume that an employer's unilateral smoking ban is a mandatory subject of bargaining, I would find that Respondent, beginning at least with its meeting of August 25, 1988, advised the Union of its intention to impose the ban. The Union counterproposed at least two locations where smoking might be allowed but no agreement was reached. The Union could have continued to seek to bargain over the subject but did not, probably in the view that it would have been futile. Yet, the Union did not test the Company's resolve, although articles V and VI of the new collective-bargaining contract do provide the procedure for resolution.[11] Indeed, article V, section D states that if the grievance is not referred to the Federal Mediation and Conciliation Service within 30 days, it ''shall be conclusively waived.'' There is no evidence in this record that the matter was ever submitted to the FMCS as contemplated by article VI. Accordingly, it is not unreasonable to conclude that the grievance has indeed been waived ''conclusively'' by the contract. Compare *E. I. du Pont & Co*., 294 NLRB 493 (1989) (taking away smoking and other privileges in locker room not an unlawful unilateral change as union waived claim by not pursuing grievance). Finally, although not argued by the parties it seems likely that the management's-rights clause is broad enough to constitute the Union's waiver of the right to bargain over the ban. See *Laredo Packing Co*., 254 NLRB 1, 8, 9 (1981). I hesitate to make that finding, however, as none of the parties have raised or briefed the issue.

Thus on two grounds, if not three, it would appear that the Union chose to waive the right to bargain. The first occurred when the employer gave it notice and the opportunity to bargain but it made only a desultory effort to do so. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979). The second occurred when it tried to grieve the matter but abandoned it at the pre-FMCS stage.

I conclude that the complaint should be dismissed. I reach this conclusion based on my finding that the topic is a nonmandatory subject of bargaining and that Respondent had no obligation to bargain over its imposition of a total ban on smoking at its Peshastin mill. Alternatively, I find that even if the ban is a mandatory subject of bargaining, it had no significant impact upon the employees' working conditions. As a second alternative, I find that Respondent gave the Union an opportunity to bargain over the subject. When the Union declined to pursue the matter it waived, either by passivity or by its abandonment of the grievance procedure, any objections it may have had to this change. Accordingly, I make the following

[11] Art. V of the new contract is the grievance procedure. It does not, however, lead to arbitration. Art. VI is a limited no-strike clause which requires the parties first to seek the assistance of the Federal Mediation and Conciliation Service to resolve grievances. If they are unable to reach a satisfactory resolution of the grievance, that clause provides certain procedures leading to a strike.

CONCLUSIONS OF LAW

1. The Respondent, W-I Forest Products Company, a limited partnership, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The total ban on smoking which Respondent imposed upon its employees at its Peshastin, Washington plant on January 1, 1989, does not breach the bargaining obligation of Section 8(d) of the Act as the ban does not constitute a mandatory subject of bargaining and therefore Respondent did not violate Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.